DANIELS
Bond
Lewis

November 27, 1957
Opinion No. 57-142



REQUESTED BY: Arizona State Dental Board

OPINION BY: ROBERT MORRISON, The Attorney General

QUESTION: A doctor was indicted for violation of 26 U.S.C.A. § 145(b), income tax evasion. He was found guilty of five counts of such offense by a jury, and was adjudged guilty and sentenced to four (4) months imprisonment and a fine of Five Thousand Dollars ($5,000), March 25, 1957. By reason of such conviction and sentence the State Dental Board, hereafter referred to as "the Board", brought disciplinary proceedings against the accused doctor under A.R.S. § 32-1263.

Considering the nature of the charge and sentence against the doctor, is he deemed guilty of a "felony" within the purview of A.R.S. § 32-1263?

CONCLUSION: Yes.

In solving this problem, we first address ourselves to the several state and federal statutes involved and then to the decisions which involve problems similar to the one before us.

The Act under which the doctor was convicted reads, in part, as follows:

> "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony. . . ." 26 U.S.C.A. § 145(b). (Emphasis supplied)

The classification of offenses under the federal law provides as follows:

"Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death of imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense." 18 U.S.C.A. § 1.

The power of the Board to discipline the subject doctor is provided in A.R.S. § 32-1263, the pertinent part of which reads as follows:

"§ 32-1263. Grounds for revocation of license

The dental board shall, after hearing as provided in § 32-1264, revoke the license issued to a person under this chapter for any of the following causes:

* * * * *

5. Commission of a felony or any crime involving moral turpitude, either before or after conviction in a court.

* * * * *"

From a reading of the foregoing statutes, this question is raised: Was the doctor convicted of a "felony" within the meaning of A.R.S. § 32-1263?

To this question, our response is in the affirmative. Search of the cases supports the conclusion above stated. In the case of In Re Minner, 1931, 3 P.2d 473, the Supreme Court of Kansas upheld a disbarment of an attorney who had been convicted of violation of the National Prohibition Act. The statute under which he was disbarred was very similar in language to A.R.S. § 32-1263. The contention of the accused was that provisions of the disbarment act did not apply to a conviction of a federal statute in a federal court, but only to violation of state statute in a state court. To this plea the Court said at page 474 of the report:

"There is no question about the offense, of which the accused was convicted, being a felony. . . .

* * * * *

> "Whether a crime is a felony or not depends, not upon the nature or character of the wrongful act, but upon the kind of punishment prescribed by statute for the offense. . . . Being guilty of an offense made a felony under the federal statute affects one's standing in the community as much as being guilty of a crime amounting to a felony under the state statute, and to the same extent disqualifies an attorney under our law to be and remain a trusted officer of the court, . . .
>
> There is nothing in our statute . . . to indicate that any distinction or difference was intended by the Legislature to be made with reference to the felony being one under a federal or state statute. Good citizenship requires obedience to and observance of the laws of the nation as much as those of the state."

A conviction of a felony, then, in a federal court under a federal statute is a conviction of a felony within the state courts.

In Seitz vs. Ohio State Medical Board, 1926, 157 N.E.304, a physician was charged with and convicted of violating the so-called Harrison Narcotics Act. He was sentenced to six (6) months in jail and a fine. The Board instituted disciplinary proceedings against the convicted doctor pursuant to the General Code, section 1275, which provided for revocation of a certificate of a physician who had been convicted of a felony. The Court upheld the revocation of the license by the Board on the principle that, in federal jurisdiction, an offense is a felony if it may be punished by imprisonment in the penitentiary, regardless of the sentence actually imposed, and is considered a felony for disciplinary purposes under a state statute.

The rule enunciated in the Seitz case is made even clearer in State vs. Fousek, 1932, 8 P.2d 791, where a policeman was found guilty of violating the Jones Act, a federal statute relating to the sale of alcohol. He was fined $100.00. In consequence of such conviction, the police commission discharged the officer pursuant to Section 511, a disciplinary statute which provided that an office becomes vacant upon the happening of certain events, such as a conviction of a felony or any offense involving moral turpitude. The Board contended that the conviction of the accused by the federal court was within the meaning of Section 511.

The Montana Supreme Court sustained the Board's action and said, at page 793:

> ". . . The character of an offense, i.e., whether a felony or a misdemeanor, must be determined by the laws of the jurisdiction where the crime was committed.
> . . .
>
> (8) The crime for which relator stands convicted is a felony in the jurisdiction where committed, and we cannot regard it otherwise. . . ."

In a recent California case, the same rule was enunciated by the Supreme Court of that state in Furnish vs. Board of Medical Examiners, 1957, 308 P.2d 924. Furnish, a physician licensed to practice in California, was charged with and convicted of violating 26 U.S.C.A. 145(b), to-wit, attempt to defeat and evade the income tax law, a felony. He was sentenced to imprisonment and a fine. Subsequently he was charged by the Board with infraction of the California Business and Professions Code, specifically Section 2383 which provides that the conviction of a felony or of any offense involving moral turpitude constitutes unprofessional conduct. His certificate was revoked. The Supreme Court said, at page 927:

> "(3) Under the federal law it is the punishment which the statute authorizes which determines whether the crime is a felony. . . .Cartwright v. United States 5 Cir., 146 F.2d 133, 135.
>
> (4) For disciplinary purposes the law of the jurisdiction where the crime was committed determines the character of the offense as a felony or misdemeanor. (Citations)
>
> The statute here clearly intended to make the conviction of a felony in the federal courts grounds for disciplinary action. . . . Had the legislature not so intended, it could, and undoubtedly would have used language such as is contained in sections 2391.5 and 2390 of the Business and Professions Code, where the restrictive term 'statutes of this State' is used."

The same conclusion was reached in In re Raab, 1951, 101 N.E.2d, 294, where a physician was convicted and sentenced for violation of 26 U.S.C.A. 145(b), attempting to evade and defeat the Income Tax Act. We quote from the syllabus of that case:

> "A physician licensed to practice medicine in Ohio who, after trial in court, is convicted of and sentenced for violation of a federal statute, the penalty for which violation is imprisonment in a federal penitentiary, is 'guilty of felony' within the meaning of that term as used in Section 1275, General Code, and because of such guilt his license to practice medicine in Ohio may be revoked by the State Medical Board of Ohio."

The foregoing rules enunciated in the several decisions discussed above are applicable to the circumstance of the doctor in this case. The federal statute, 26 U.S.C.A. § 145(b), expressly says violation of this Act is a felony and the punishment may be assessed for a period of five years in prison. A.R.S. § 32-1263 is a broad and inclusive statute. It is the opinion of this office that in the use of the term "felony", the legislative intent was to include crimes classified felonies under the laws of the particular jurisdiction in which the crime was committed.

For the reasons stated above, it is the opinion of the Department of Law that the word "felony" includes those felonies committed and punished under federal law by federal court, irrespective of the sentence actually imposed, and that the felony there committed is sufficient ground upon which the Board may revoke the doctor's license.

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